United States Court of Appeals

for the Second Circuit

RESPONSE TO CROSS APPEAL

ORIGINAL

77-7158

To be argued by
JOSEPH ARTHUR COHEN

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

KATHLEEN G. O'GEE,

Plaintiff-Appellee,

—against—

DOBBS HOUSES, INC.,

Defendant and Third Party Plaintiff-Appellant-Cross-Appellee,

—against—

UNITED AIR LINES, INC.,

Third Party Defendant-Appellee-Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

BRIEF OF CROSS-APPELLEE DOBBS HOUSES, INC.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF CROSS-APPELLEE, DOBBS HOUSES, INC.

Statement of Facts Relevant to the Cross-Appeal

Plaintiff's action against Dobbs Houses, Inc. (hereinafter "Dobbs") was to recover damages for personal injuries allegedly caused by the negligence of Dobbs. The gravamen of that claim was that Dobbs had failed to properly load a cold food buffet in that it failed to manually lock the same.

The said cold food buffet had an automatic locking device; and it was admitted that such buffet, the automatic locking devices, the tracks on which the buffet ran, and

its associated gear was owned, supplied and maintained by United Air Lines, Inc. (hereinafter "United"), the Cross-Appellant herein (366a-368a and page 7 of Cross-Appellant's brief). Denying that its employees were negligent in failing to lock a cold food buffet which was supposed to have had a functioning automatic locking device, Dobbs impleaded United as a third-party defendant for indemnity or contribution and alleged, in essence, that if the accident occurred as plaintiff claimed, then it must have been due to some fault on the part of United in supplying a cold food buffet with a malfunctioning automatic locking device, and in failing to maintain that equipment (see Third-Party Complaint in Record on Appeal, p. 11).

United's answer to the Third-Party Complaint (Record on Appeal, p. 15) denied any allegations of fault on its part and, in addition, set forth a counterclaim asserting that by reason of the Catering Contract between United and Dobbs (613a-617a), Dobbs was required to reimburse United for United's expenses and attorneys' fees incurred in defending the claim of Dobbs.

The case was tried before the Hon. Jack B. Weinstein and a jury. *United rested its case without putting in any proof whatsoever as to its claimed items of damage.* The jury was then charged by the Court and instructed that it was to determine, among other things, the relative degrees of negligence or fault as between Dobbs and United (497a-498a, 503a-505a). Counsel for United did not object to that charge or to the Court's asking the jury for special findings on the issue of proportionate fault.

The jury returned a verdict finding that Dobbs was completely at fault and that there was no fault on the part of United (511a-512a), and the jury was then excused by the Court and disbanded (513a).

It was only after the vedict was in and the jury disbanded that counsel for United moved to recover the damages incurred by United in defending itself in this action (515a-517a). Not only had United failed to put in any proof whatsoever of its claimed damages, but the Court found that the contract on which United was relying was inapplicable to the situation at hand (516a). The Court denied this claim by United, but granted United leave to brief it and make an appropriate post-trial motion (517a). United, however, failed to make any such post-trial motion.

As indicated on Page 3 of United's brief, the judgment which dismissed United's counterclaim was entered on March 10 and filed on March 11, 1977. United did not appeal therefrom within the 30 days permitted, but rather served a cross-appeal on April 19, 1977 after Dobbs had filed its Notice of Appeal from that judgment.

POINT I

Having Offered No Proof of Damages Whatever on Trial, United Is Now Precluded From Seeking the Same.

United offered no proof whatsoever on trial of the damages it claimed in its counterclaim and which it here seeks to recover. Nor did it either ask for or obtain any stipulation on the amount of such damages. The claim was in effect abandoned by United during the trial and only after receipt of the favorable verdict and the discharge of the jury did United then seek to resurrect this claim.

Having set forth a counterclaim seeking to recover its damages herein pursuant to a contract, it was the obligation of United to prove its damages. It may not withhold such proof during the trial and then seek to proffer the same after the jury has rendered its verdict and been disbanded, *Davis* v. *Naviera Aznar, S.A.*, 37 F.R.D. 223.

The tactic here sought to be followed by United would bring about a multiplicity of suits, as it is tantamount to splitting a cause of action which is, of course, prohibited, see *United States Lines Company* v. *Maritime Ship Cleaning and Maintenance Co.*, 235 F.Supp. 259. The obligation to plead and prove the kind of damages here sought by United is also recognized in New York, see *Fairchild Camera & Instrument Corporation*, 31 A.D. 2d 534, 295 N.Y.S. 2d 75. And in the very Georgia case so heavily relied upon by United, *Pinkerton & Laws* v. *Robert & Co.*, 129 Ga. App. 881, 882, the Court indicates that this type of piece-meal or afterthought litigation is not to be condoned and that, quoting from *Perry* v. *McLendon*, 62 Ga. 598, 604, a party "must discharge all his weapons, and not reserve a part of them for use in a future rencounter [sic]."

United has had its full day in court. It failed to offer any proof of the damages it claims. It is not entitled now to a further trial to offer that proof.

POINT II

The Trial Court Correctly Held That the Contract on Which United Relies Is Inapplicable to This Case.

As is indicated in its preamble, the contract on which United relies (613a-616a) is a "Catering Agreement" whereby Dobbs as Caterer agreed

> ". . . to furnish to United, and United agrees to purchase and accept from Caterer, catering service consisting of the preparation of full meals, snacks, liquids and other food service as directed by United for consumption by passengers on its aircraft * * *."

There is nothing whatever in that contract that imposes on Dobbs a duty to maintain the buffets and their auto-

matic locking devices and track systems. Indeed, United has admitted on page 7 of its brief that it was its duty to maintain that equipment which was owned and supplied by it.

The provision in said contract upon which United here relies is Paragraph 13 (616a) which provides:

> "Caterer agrees to assume all risk of loss and to indemnify and hold United, its officers, agents and employees, harmless from and against any and all liabilities, demands, claims, suits, losses, damages, causes of action, fines, or judgments, including costs, attorney's and witnesses' fees and expenses incident thereto, for injuries to persons, damage or destruction of property (including property of United) arising out of or in connection with this Agreement, unless caused by the gross negligence or willful misconduct of United, its officers, agents or employees. In the event that any demand or claim is made or suit is commenced against United, United shall give prompt written notice thereof to Caterer and the Caterer shall have the right to compromise or defend the same to the extent of its own interest."

Thus, on its face, any obligation to indemnify must stem from something "arising out of or in connection with" the Catering Agreement. However, as we indicated earlier, the claim made by Dobbs against United did not stem from the Catering Agreement. It stemmed from United's own common law duty to keep in good repair and maintenance machinery and equipment that it supplied to others to use. There is nothing at all in the Catering Agreement relating to that obligation and thus the claim that Dobbs was making against United was not based upon some provision in the Catering Agreement.

Further, as the trial court held (516a), the above-quoted provision in the Catering Agreement is inapplicable to a situation such as the instant one. It applies where a third party might sue United because of some injury or damage caused that party by the catering work of Dobbs. It does not apply to where Dobbs is suing United for an alleged breach by United *ex delicto*. That such was indeed the intent of the parties is evidenced and made manifestly clear by the last sentence of the so-called Indemnity Agreement, requiring United to give prompt written notice of any indemnifiable claim or demand to Dobbs, so that Dobbs might have the right to compromise or defend the same. Obviously, the kind of indemnifiable demand or claim embraced by the Indemnity Agreement was for claims against United by third parties, and not claims made against United by Dobbs. For it would make no sense whatever to provide that United was obligated to give prompt written notice to Dobbs of any demand or claim that Dobbs had made against United!

Indeed, the trial court's finding that this contractual provision is inapplicable to the situation at hand is even supported by the Georgia authorities set forth in United's own brief. Thus, in *Robert & Company Assoc.* v. *Pinkerton & Laws Co.*, 120 Ga. App. 21, the plaintiff seeking indemnity based upon a written agreement had earlier settled claims brought against it in other litigation by third parties. It is interesting to note that although it was awarded indemnity for the amount that it paid to the third parties, it was not awarded attorney's fees and costs such as United here claims. Indeed, in subsequent litigation between those same two parties, an appeal on the denial of the claim for attorney's fees was withdrawn on oral argument by the indemnitee, see *Pinkerton & Laws Company* v. *Robert & Company Assoc.*, 129 Ga. App. 881.

Nor does *Georgia Ports Authority* v. *Central of Ga. Railway Company*, 135 Ga. App. 859, support United's position herein. For it, too, involved a situation where contractual indemnity was sought, and allowed, as against payment made by the indemnitee to a third party. And it is again to be noted that although indemnity for the amount paid the third party was granted, there is no indication that there was any award made for counsel fees or other expenses of defense. Similarly, in *Camp Concrete Products* v. *Central of Ga. Ry. Co.*, 134 Ga. App. 537, where the plaintiff and defendant were aligned in a position respectively similar to that of Dobbs and United here, the denial of the plaintiff-indemnitor's claim against the defendant-indemnitee did not carry with it an award of counsel fees or defense expenses to the said defendant-indemnitee.

In Georgia, as elsewhere, the law is well settled that one who seeks by contract to absolve himself from the consequences of his own negligence must do so in unequivocal terms, see the Georgia authorities quoted on this point in *Southern Railway Company* v. *Brunswick Pump & Paper Co.*, 376 F.Supp. 96, 100. There is no specific and unequivocal provision in the case at bar that says that Dobbs is to indemnify United for any claim made by Dobbs against United because of United's negligence in maintaining and supplying of the physical equipment here involved. There is nothing in this contract that clearly and unequivocally states that if Dobbs sues United and loses, it is required to pay counsel fees and expenses of defense to United. Indeed, a "winner gets counsel fees" approach is contrary to the American rule, *Alyeska Pipeline Service Co.* v. *Wilderness System*, 421 U.S. 240, 95 S.Ct. 1612.

Thus, in sum, we submit (1) that the claim made by Dobbs against United was not one arising out of the Catering Agreement, (2) that the indemnity provision in the

Catering Agreement on which United's counterclaim is based applies solely to actions brought against United by third parties as is evidenced by the last sentence therein, (3) that the said indemnity provision does not specifically and unequivocally call for Dobbs to indemnify United against United's own negligence, and (4) that this effort by a victorious party to obtain counsel fees and defense expenses violates the American rule as recently re-articulated by the Supreme Court. Accordingly, we respectfully submit that the trial Judge was correct in dismissing United's counterclam for counsel fees.

CONCLUSION

The contractual provision on which United seeks to obtain a damage recovery against Dobbs for the attorney's fees and expenses incurred by United in defending against the claim made by Dobbs is, as the trial court held, inapplicable. And, it is to be remembered that United failed completely to offer any proof of damages on trial and it must be considered as having abandoned such claim. It is certainly precluded from advancing any claim after trial. Accordingly, that portion of the judgment dismissing United's counterclaim against Dobbs should be affirmed.

Respectfully submitted,

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